CORRESPONDENCE.

THE SCINTILLA DOCTRINE.

Editor Virginia Law Register:

Referring to the *scintilla* doctrine once more, and to the discussion of that doctrine by Professor Lile in 9 Va. Law Register, 245, is it clear that the appellate court would reverse the action of the lower court for refusing an instruction, propounding the law correctly, but based upon evidence plainly insufficient to support it, where a righteous verdict was reached? It is admitted that the rule in Virginia is to give an instruction which correctly propounds the law, if there be any evidence at all to support it, though this evidence be insufficient to support a verdict in favor of the propounder of the resolution. For a statement of the rule see *Richmond P. & P. Co.* v. *Allen*, 43 S. E. 356.

But would the violation of this rule be reversible error in the case cited by Professor Lile? He says:

"Suppose, in an action for negligence, the plaintiff's evidence is plainly insufficient to make out his case, but, there being some slight evidence ('scintilla') of negligence, an instruction predicated thereon, and propounding the law correctly, is asked for by the plaintiff. This the trial court refuses. Suppose, now, the jury finds for the *defendant* a confessedly righteous verdict. The appellate court will reverse for the (alleged) error in refusing plaintiff's instruction."

By the terms of this statement it is evident that the court can see from the whole record that even under correct instructions a different verdict could not have been rightly found, for remember, it is "*a confessedly righteous verdict,*" and that the plaintiff could not have been prejudiced by the action of the court in refusing his instruction, for his evidence was "*plainly insufficient to make out his case,*" and a verdict in his favor must have been immediately set aside.

In this case we submit that the refusal of the court to give the instruction asked for, would not be ground for the setting aside of a confessedly righteous verdict, and that the action of the lower court in entering judgment upon this righteous verdict would not be reversed because of any instruction given or refused. The result being *righteous* the court will not reverse the judgment and set aside the verdict because of errors in giving or refusing instructions.

This doctrine, which is well settled in Virginia, is thus stated in *Leftwich* v. *Richmond*, 100 Va. 164, at page 168:

"If it were true, as plaintiff in error contends, that the court erred in refusing to give the instructions offered by him and in giving the instruction which it did give, no prejudice resulted to the plaintiff therefrom, for upon the case made by the plaintiff, the jury, upon correct instructions, could not properly have found in his favor.

"It is the well settled rule of this court, recognized and acted upon in numerous cases, that if the court can see from the whole record that even under correct instructions a different verdict could not have been rightly found, or that the party complaining could not have been prejudiced by the action of the court

in giving or refusing instructions, it will not for such errors reverse the judgment and set aside the verdict. *Richmond Ry. &c. Co.* v. *Garthright*, 92 Va., 627, 731, and cases cited; *Wright* v. *Independence Nat. Bank*, 96 Va. 728. The judgment must therefore be affirmed."

In view of this well established rule, it is submitted that in the case stated by Professor Lile, since "the plaintiff's evidence is plainly insufficient to make out his case," and notwithstanding the erroneous action of the court in refusing the instruction based upon this evidence, the jury has arrived at a "confessedly righteous verdict," the rule laid down in *Leftwich* v. *Richmond* would require the appellate court to affirm the judgment of the lower court entered upon this righteous verdict, for the court can see "from the whole record that even under correct instructions, a different verdict could not have been rightly found."

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